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In the
Supreme Court of the United States

OCTOBER TERM, 1992

GOVERNOR EDWIN EDWARDS, ET AL.
Petitioners

v.

SOJOURNER T., ET AL.
Respondents

RICHARD IEYOUB, ATTORNEY GENERAL OF THE STATE OF LOUISIANA, AND HARRY CONNICK, SR., DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS,
Petitioners

v.

DR. IFEANYI CHARLES OKPALOBI
Respondent

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* LOUISIANA LAWYERS FOR LIFE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF THE ATTORNEY GENERAL AND GOVERNOR OF LOUISIANA AND THE DISTRICT ATTORNEY OF ORLEANS PARISH

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INTEREST OF AMICUS

Amicus Louisiana Lawyers for Life is an organization of Louisiana attorneys who support the principle, traditional in the Civil Law, that children *in utero* should be protected by law. We are also mindful of this Honorable Court's legitimate concern with principles of institutional integrity and *stare decisis*. This brief is filed with the written consent of all Petitioners and Respondents as provided to the Clerk of this Honorable Court.

We are proud to be heirs of the best traditions of English-speaking peoples as expounded by this Court for 200 years. Our fidelity to the Rule of Law likewise includes the memory and experience of our Latin legal heritage, which extends back 2,000 years. *Amicus* can speak more frankly than the State itself. As Walker Percy observed of Louisiana:

> "The hope, often fulfilled, is that the union will bring together the virtues of each, the best of the two life-styles, industry and grace, political morality and racial toleration. . . . Unfortunately and all to often, the Latins learned Anglo-Saxon racial morality and the Americans learned Latin political morality. . . ."[1]

Louisiana needs both this Court's authority and its own laws to keep the peace. The Abortion Cases[2] under-

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[1] W. Percy, *Sign Posts in a Strange Land* 14 (N.Y. 1991); see also his novel, *The Thanatos Syndrome* (N.Y. 1987).

[2] As used herein, "the Abortion Cases" include *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), down through and including *Casey v. Planned Parenthood*, 112 S.Ct. 2791 (1992).

mine both. *Amicus* hopes, as a friend of the Court, to suggest a way out. Stating what we remember will show why the United States District Judge who applied the Abortion Cases below expressed the greatest reluctance.

SUMMARY OF ARGUMENT

Under the Privileges and Immunities Clause of Article 4, Section 2 of the Constitution, Louisiana acknowledged the rights of Black citizens of other states prior to *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The Fourteenth Amendment was intended to continue the dialogue of liberty interrupted by *Dred Scott*, not to void instances where a state had already granted some persons protection of laws unknown in other states.

The inherent right of states to extend the protection of law to unborn children, exercised by Louisiana long prior to the Fourteenth Amendment, should be respected under the Privileges and Immunities Clause of Article 4, Sec. 2. Louisiana's inherent right is indistinguishable from that exercised by Massachusetts to recognize Blacks as citizens. The Civil Law tradition long recognized unborn children as human beings and legal persons. Reconsideration of the Abortion cases would enhance, rather than undermine, respect for the Court's decisions.

Though the legal authority of judicial review flows from *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803), its political authority historically flows from the appeal of the American Revolution to the common moral ground between English precedent and the European law of nations. This ground of political authority was disregarded in *Dred Scott*, and again in the Abortion Cases.

ARGUMENT

Introduction

The Treaty of Cession between France and the United States required that the inhabitants of Louisiana be incorporated in the Union, admitted to the enjoyment of "all the rights, advantages and immunities of citizens of the United States," and protected in "the free enjoyment of their liberty, property, and religion which they profess."[3] John Quincy Adams protested the treaty made "French and Spanish laws a part of the laws of the Union. . . ."[4] When the American governor appointed by Jefferson vetoed an Act declaring what Spanish and Roman laws were still in effect, the legislature dissolved itself in protest, stating: "We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair." *Manifesto* of the Legislative Council of the Territory of Orleans, May 28, 1806 in Yiannopoulos, *Louisiana Civil Law System*, Appendix p. 9. (Claitors, 1971). Subsequently, the *Louisiana Digest of 1808* of the Civil Law in effect was adopted and approved. Louisiana's general law remains the Civil Law.

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[3] Treaty Between the French Republic and the United States, concerning the Cession of Louisiana, signed at Paris the 30th of April, 1803, Article 3.

[4] T. Norton, *The Constitution of the United States: Its Sources and Application* 81 (N.Y. 1965).

Louisiana also embraced the public law of the United States Constitution. The Privileges and Immunities Clause of Article IV Sec. 2 of the Constitution was important to the inhabitants of Louisiana. It provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

This provision recognizes that the States retained the inherent right to extend their legal protection to persons subject to their jurisdiction, but must extend the same protection to citizens of other states as to their own citizens.

In 1828 the elected Governor of the State of Louisiana vetoed a bill which would have prohibited "free negros and persons of color from entering this state." C. Gayarre', *History of Louisiana*, Vol IV *The American Dominion*, p. 651 (1882):

> "The third, and last, constitutional objection to this bid, the Governor considered as 'equally strong.' He remarked that . . . the Constitution secures to the citizens of each State all the privileges and immunities of citizens of the several States. 'In the consideration of this bill,' said the Governor, 'it is only necessary to ascertain whether the persons who are its objects are citizens of any of the States of the Union. In this inquiry, the fact presses itself upon us, that, in some of the States, they are citizens to the full extent of the term. If we can exclude one portion of the citizens of those States, we can exclude the whole. If we are free to refuse ingress to them,

> they are equally at liberty to deny access to us; and thus the most fatal animosities and collisions might arise between the States, a calamity which it was the object of the Federal Constitution to obviate."

Thus ". . . a Governor of Louisiana . . . openly declared to her Legislature, that a negro was as much a citizen of Massachusetts as John Quincy Adams or Daniel Webster, and, as such, entitled in our State to all the rights guaranteed by the Constitution to these two distinguished men, or any other, white man . . . ." (*Ibid.*) Subsequently *Dred Scott v. Sandford, supra,* held to the contrary.

In *Caesar v. Greenleaf,* 2 *Adams Legal Papers,* No. 42, 64 (October 1772, Essex Inferior Court, Newburyport, Massachusetts), Plaintiff brought an action in trespass against Defendant for enslaving him, arguing that slavery did not exist under Massachusetts law. Plaintiff invoked *Day v. Savadge,* Hobart 85, 87, 80 Eng. 235 (C.P. 1615):

> "Some Legislatures So[uth]ward in the colonies have enacted, that blacks, as negroes are Slaves.
>
> Hobart 87. Act of Parliament. Jura naturae immutablia. An act of parliament against natural Equity, as to make one Judge in his own cause is void." (No. 42, *supra,* 67.)

Slavery itself had long been recognized as contrary to what was understood as natural law, though permitted by positive law.[5] *Caesar v. Greenleaf* produced the

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[5] Justinian's *Corpus Juris Civilis, Institutes* 1.2.2 restates such a recognition extending back to the Stoic jurists, Ulpian, *Digest* 50.17.32, and Florentinus, *Digest* 1.5.4.

argument that such positive legislation was void inasmuch as "the rights of nature are immutable." Plaintiff also invoked "*Sommersett's Case,*" (*Somerset against Stewart*) 98 Eng. Rep. 499, 510, 20 St. Trials (N.S.) 1, 82 (K.B. 1772), for the illegality of keeping in slavery a person brought to free soil. The jury of Massachusetts men found for the plaintiff and awarded damages for his enslavement. 2 *Adams Legal Papers* 51-52.

Judge John Minor Wisdom in his "Brief Remarks on the Bicentennial of the U.S. Constitution," 38 *La. Bar Journal* 238 (Dec. 1990), recalled how Louisiana had participated in a dialogue of liberty before *Dred Scott.* In *Marie Louise, f.w.c. v. Marot et al.,* 9 Louisiana Reports 473 (La. 1836), a "free woman of color" claimed the freedom of her daughter Josephine on the grounds "she was taken to France by the defendants, a country in which slavery is not tolerated, and she thereby became free." *Id.,* 474. The Louisiana Supreme Court affirmed recognition of freedom by the judge and jury below, observing that "[b]eing free for one moment in France, it was not in the power of her former owner to reduce her again to slavery."

In *Somerset against Stewart,* 98 Eng. Rep. 499, 510, 20 St. Trials (N.S.) 1, 82 (K.B. 1772), Plaintiff claimed freedom because he was brought for a time into England. His counsel invoked French and other European precedent. He observed of slavery that "[i]ncompatible with the mild and humane precepts of Christianity, it began to be abolished in Spain, as the inhabitants grew enlightened and civilized. . . ." Together the jury's decision in *Caesar v. Greenleaf* and other Massachusetts cases,[6] *Somerset,*

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[6] The editors of *Adams Legal Papers* take issue with Adams' recollection of the importance of the early slavery cases. 2 *Adams Legal Papers* 52. It nonetheless shows the evolving consciousness awakened by the Revolution. Slavery was held illegal in 1783 under the "free and equal"

supra, Marie Louise, f.w.c., supra, and the Louisiana Governor's veto demonstrate *Dred Scott* was erroneous *historically.* Members of this Court have recognized *Dred Scott* was disavowed by the Civil War Amendments, though it appears never to have overruled it judicially.

The Civil Law's Contribution

The *favor libertatis* or presumption in favor of liberty in Spanish law apparently started with a rescript of a non-Christian Roman Emperor: "the post-classical rule . . . that the child of a mother free at any time between conception and delivery would be free, also, may have has its origin in an isolated humane decision of Hadrian."[7] In time this bias toward liberty gradually but substantially led to a large population of "free persons of color" in Louisiana. The Spanish *Laws of Las Siete Partidas* (New Orleans, 1820), a translation commissioned by the Louisiana Legislature, *Partida* Fourth, Title xxi, Law 2 provided:

> "They who are born of a free man and a mother in slavery, are themselves slaves: for they follow the condition of their mother, as to slavery or emancipation. . . . But if the mother happen to be pregnant, and she be enfranchised, the child born of her will be free, *though she should not carry the child in her womb more than an hour, or less,* after she was enfranchised. And though the mother should afterward return to a state of slavery, the child would nevertheless, remain free, on account of the time whether great or small she

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Footnote continued

clause of the constitution of the Commonwealth of Massachusetts. (*Ibid.*)

[7] Nina Pugh, *Nasciturus: The Roman Classical Law on the Inception of Human Personality* (L.S.U. Thesis, 1963).

> had carried it in her womb, after she was emancipated. (Emphasis added.)

Thus the principle "being free for one moment" a person was forever free was first recognized in the case of unborn children.

Louisiana likewise extended the protection of Louisiana law to her unborn children generally. Article 29 of the Louisiana Civil Code of 1825, in effect before "the War," provided: "Children in their mother's womb are considered in whatever relates to themselves, as if they were already born. . . ."[8] Article 29 remained in effect as part of the Civil Code of 1870, adopted during Reconstruction to root out the last vestiges of slavery, until after the Abortion Cases began to be decided.

The instant case calls to mind the unilateral choice made under early Roman law on June 17th of what would be the year 1 B.C. in our calendar, by a husband, who, after expressing the most tender love for his pregnant wife, wrote her: "If you are delivered of a child, . . . if it is a boy, keep it, if a girl, discard it. You have sent me word, 'Don't forget me.' How can I forget you. I beg you not to worry.' " N. Lewis, *Life in Egypt Under Roman Rule* 54 (Oxford: Clarendon, 1985).

The principle of Article 29 reflects the *jus naturale* as understood in "the law of nations" expounded by accepted international law authorities of the day. Samuel von Puf-

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[8] *Louisiana Digest of 1808*, p. 8-9 Art. 7 had stated: "Children in their mother's womb cannot be reckoned among the number of children . . . . Yet the hope that such children may be born alive, causes them to be considered in whatever relates to themselves, as if they were already born. . . ."

fendorf observed that "obligation has also been enjoined upon parents by the law of nature, that . . . they not destroy by abortion the offspring conceived within their flesh, nor expose it, nor put it to death after it has been brought into the light of day. . . ." 2 *Elementorum Jurisprudentiae Universalis Libri Duo* Bk. 2. Obs. 5 p. 283 (Oldfather translation, Oxford, 1931). Puffendorf reasoned: "For while progeny is called into being out of the substance of parents, the result, however, is to place it in the same human lot as themselves, and to make it capable of suffering an injury even from the parents." 2 *De Officio Hominis et Civis Juxta Legem Natualem,* Ch. III, "On the Duties of Parents and Children," p. 98 (Moore Translation, Oxford 1927). Puffendorf cites Grotius as agreeing with him on a single exception to the principle that one cannot "destroy the child while unborn," to wit, "except in case both mother and the child would otherwise perish." Puffendorf, *On the Law of Nature and Nations,* Bk. VI, Ch. II, p. 918 (1688 edition, as translated by Profs. Oldfather, Oxford, 1938).

When Massachusetts joined the Union, it retained the inherent right to incorporate its understanding of natural rights into its own positive law by recognizing Blacks as human beings and legal persons, even before the adoption of the Ninth and Tenth Amendments. Pursuant to obligations under "the treaty made at Paris," Louisiana was admitted to the Union "on an equal footing with the original states." Act of Congress April 8, 1812, c.50, 2 U.S. Stat. 701 (Act of Admission). Louisiana thus retained the inherent right to incorporate the *jus naturale* by protecting unborn children as human beings and legal persons. Granted, *arguendo,* Massachusetts traditionally considered "the unborn child was a part of the mother. . . ."

Dietrich v. Northampton, 138 Mass 14 (1884).[9] Nevertheless, just as Article 4, Section 2 required Louisiana to respect Massachusetts' inherent right to protect its citizens of African descent, the same provision also establishes Louisiana's constitutional right to demand that the rest of the Union honor the legal protection of unborn children subject to Louisiana's jurisdiction.

The Historical Basis of Judicial Review

The very words "An Act against the Constitution is void" were uttered by James Otis on 24 February 1761 in *Petition of Lechmere*, 2 *Legal Papers of John Adams* (henceforth cited as *Adams Legal Papers*) No. 44, "Adams' Minutes of the Argument" p. 127 (Mass. Hist. Soc. 1965). "Then and there the child Independence was born," John Adams was later to write.[10]

Petition of Lechmere, supra, was the famous "Writs of Assistance" case, where the colonists challenged the functional, if not exact legal, equivalent of a general search warrant. It foreshadowed *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765) and Lord Mansfield's famous decision in *Wilkes v. Wood*, 19 How. St. Tr. 1075 (1775).

From Adams' notes in 2 *Adams Legal Papers* 128 the legal authority for Otis's argument that an act against the Constitution was void was Sir Edward Coke's opinion in *Dr. Bonham's Case*, 8 Co. Rep. 113b, 118, 77 Eng. Rep. 646, 652-653 (C.P. 1610), and Sir Henry Hobart's decision in

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[9] Overruled by *Torigan v. Watertown News*, 225 N.E.2d 926 (1967).

[10] 2 *Adams Legal Papers* 122. Historians dispute whether Adams' notes were written by him "at or near" the argument. Regardless of that, Adams's later statement shows the meaning of the event in American Revolutionary consciousness.

Day v. Savadge, Hobart 85, 87, 80 Eng. 235, 237 (C.P. 1615). Though *Day v. Savadge* mentioned natural equity and natural rights, *Dr. Bonham's Case* was not a natural law decision. Such a theory is inconsistent with *Prohibitions del Roy*, 12 Coke 63 (1612).[11] For Coke "common right and reason" meant precedent.

Otis expanded his argument in *The Rights of the British Colonies Asserted and Proved* (Boston 1964), reprinted in B. Bailyn (ed.) *Pamphlets of the American Revolution* 419 *et seq.* (Harvard 1965). Otis's own appendix thereto consists of Instructions voted by the City of Boston in May 1764 (*id.*, 471) and the "Substance of a Memorial" pursuant to those instructions. In it, Otis added Vattel, *The Law of Nations,* to the cases cited.

Otis there paraphrased *Dr. Bonham's Case* as "acts against the fundamental principles of the British constitution are void." He rephrased *Day v. Savadge* as "acts of Parliament against natural equity are void." Bailyn, *supra*, at p. 476. He declared these judicial declarations "agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion." (*Id.*, 476-477.)

This infusion of fundamental moral principles of natural law, as understood in the law of nations, into English liberty underlay not only the Declaration of Independence, but the very meaning of this Nation reflected in Lincoln's Gettysburg Address. As shown above, Otis's interpretation of *Day v. Savadge* was invoked against slavery in *Caesar v. Greenleaf.*

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[11] These three English cases can be found at Pound, *The Development of Constitutional Guarantees of Liberty* "Source materials," 112, 163-166, 171-176. (Yale, 1957.)

Joined with his restatements of *Dr. Bonham's Case* and of Vattel, Otis's interpretation led to judicial review. Vattel observed that the legislative power does not extend so far as to permit legislators to change the constitution of a country.[12] Otis paraphrased Vattel to urge it was "contrary to reason that the supreme power should have the right to alter the constitution," leading to consequences "not very remote from a flat contradiction." (*Bailyn, supra,* 477.) To (and from) an American consciousness so formed, Chief Justice Marshall addressed his historic words in *Marbury v. Madison,* 1 Cranch 137, 177 (1803).

This Court's Privacy Decisions

In *Boyd v. United States,* 116 U.S. 616, 625-627 (1886), this Court recognized James Otis' argument and the ensuing English cases as expressive of the very roots of our constitutional law. *Boyd* was cited for the right of privacy in *Griswold v. State of Connecticut,* 381 U.S. 479, 484-485 (1965). Yet there remain fundamental differences between *Griswold* and the Abortion Cases.

First, *Griswold* truly did involve violation of marital privacy. The Connecticut statute provided for one year imprisonment for any "person who uses any drug, medicinal article or instrument for the purpose of preventing conception. . ." *Id.,* 480. Griswold was found guilty as an accessory.

Most abortions statutes, including the Louisiana abortion statutes voided by the Abortion Decisions, do not make it illegal for a woman to obtain an abortion. They declare that the abortionist's conduct is criminal, but they

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[12] *Id.,* 476-477; Vattel, *The Law of Nations; or principles of the Law of Nature applied to the conduct of affairs of Nations and Sovereigns* printed (from a 1759 London translation) by Butler (Northampton, Mass. 1805) pp. 69-70 (1805).

do not evision a woman obtaining an abortion being prosecuted as an accessory. She is free to travel to other states under Art. 4, Sec. 2.

In the Abortion Cases the right of privacy was improvidently expanded to conflict with the Privileges and Immunities Clause of Article IV. Article 4, Sec. 2 was erroneously rendered a dead letter by *Dred Scott.* While the Fourteenth Amendment corrected the denial of Privileges and Immunities to Black citizens, it was never intended to divest unborn children of protection already extended by Louisiana law. Moreover, the other "several states" also had implicit authority to depart from the common law rule with respect to unborn children, as recognized by California in *Scott v. McPheeters,* 92 P.2d 678 (1939).

This Court has previously recognized that *Boyd* had been overgeneralized. *Boyd* was extended in *Gouled v. United States,* 255 U.S. 298 (1921), resulting in the "mere evidence" rule. It was applied in *Marron v. United States,* 275 U.S. 192, 195 (1927); *United States v. Lefkowitz,* 285 U.S. 452, 464 (1932), *Harris v. United States,* 331 U.S. 145, 160 (1946). Then came attempts to limit the overgeneralized "right to privacy." *On Lee v. United States,* 343 U.S. 747, 753 (1952); *Abel v. United States,* 362 U.S. 217, 235 (1960), *Schmerber v. California,* 384 U.S. 757, 770 (1966). Finally, this Honorable Court overruled the "mere evidence rule" in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 301-310 (1967), as not protective of the right to privacy. No constitutional crisis resulted.

Policy Consideration

Proponents of the right to choose in the sense op-

posed by Puffendorf,[13] *supra* sometimes argue that legislation such as Louisiana's imposes an undue burden upon the poor. But what is the impact of abortion itself? Indeed, "when the size of population groups is controlled for, it becomes apparent that the highest rate of abortion occurs among unmarried women less than 30 years of age who are nonwhite and non-Hispanic and have a family income of less than $11,000 per year." Goldsmith, "Researchers Amass Abortion Data," 262 *JAMA* No. 11, 1431 (September 15, 1989). In plain English, "nonwhite and non-Hispanic" means Black.

Louisiana can afford neither the inference that could be drawn someday from the disparate impact of procedures performed within its borders, nor silence about it. The statute at issue cannot justly be held unconstitutional on its face without consideration being given to very disturbing statistics. Under the Abortion Cases, Louisiana went from no reported legal abortions in 1973 to a high of 19,240 in 1985. (*Ibid.*) The CDC "Abortion Surveillance — United States, 1989," 41 MMWR No. SS-5, 1, 23-24 (September 4, 1992), reflects that there were 496 abortions per 1,000 live black births, as compared to 252 abortions per 1,000 live white births, for the 31 states for which data are available and the District of Columbia.

Is this Court absolutely *certain* it even wants our acceptance of the reality of legal abortion? Our acceptance would unravel legal, moral, cultural, historical and

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[13] Their attempt to distinguish between abortion and postnatal infanticide breaks down in practice. The motives for both are largely the same. For example, the State of Maharastra, India, where "clinical sex determination services" are advertised, passed unavailing legislation "to prevent the selective abortion of female fetuses by banning tests for prenatal sex determination." Radhakrishna Rao, "Sex selection continues in Maharastra," 343 *Nature* 497 (8 Feb. 1990).

religious threads woven into the fabric of our consciousness of our common humanity. Would our bare experience of each other in our largely separate lives be warm enough to carry us all safely through a winter's winds of man's seasonal inhumanity to man? The burden of proof of humanity imposed by the Abortion Cases invalidates truths we hold self-evident. A choice is necessary.

By granting writs to be made certain and informed, this Court can enhance popular respect for judicial review of constitutionality. This Court now has the opportunity, perhaps for the last time, to reconnect judicial review of constitutionality and recognition of our common humanity, both elements of American consciousness formed at the very beginning of the Revolution by Otis's argument, as expounded in *Rights of the British Colonists, supra*, Bailyn (ed.) *supra*, at pages 454-455 and 476-477 (acts of Parliament void), and 438-434 and 446-447 (black and white entitled to all "essential civil rights"), respectfully.[14] The Civil War Amendments can be understood as continuing the dialogue of liberty interrupted, as Lincoln understood, by *Dred Scott.* This chance to change history will be lost if this Honorable Court again acts from the fear expressed by Chief Justice Taney in *Dred Scott* that a different decision "would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day." Fehrenbacher, *Slavery, Law, & Politics: The Dred Scott Case in Historical Perspective* (Oxford, 1981), page 198.

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[14] Nash, Race and Revolution (Madison House, 1990) finds the belief slavery was inherently wrong was not confined to the North. Rather, it was widely perceived as inconsistent with Revolutionary principles because of "Otis's pamphlet, based on a natural rights argument . . . read throughout the colonies." (p. 8.) For the spread of the analogous French Revolutionary belief into Louisiana, see Kimberly Hanger, "Conflicting Loyalties: The French Revolution and Free People of Color in Spanish New Orleans," to be published in 34 Louisiana History No. 1 (Winter 1993).

Both *Dred Scott* and the Abortion Cases show how bad law can anesthetize the conscience. Each side now fails to acknowledge the hard cases[15] the other side raises. Hard cases can best be resolved in good faith by democratic legislatures.[16]

CONCLUSION

Wise action in this, as in other matters, begins with good judgment as to what one can and cannot change. Where the Court this century acted to further the dialogue of liberty, resumed after *Dred Scott* by the Civil War Amendments, it was able to bring about change. What the Court did had wide moral support. It was consistent with the ideals of the American Revolution. Like Lincoln, most Americans consider the Declaration of Independence part of the Constitution in a sense. In the sense of political, rather than legal, authority they are right. By the American Revolution this Nation constituted itself, on a moral basis expressed to the world, as a people having a decent respect for all of mankind.

Political authority is primary. That it flows from the consent of the governed is a matter of fact, not of law. Where political authority dies, as did the Crown's in the American colonies, no repetition of legal precedent can save it.

As lawyers we are very respectful of this Court's decisions over the past two hundred years. Yet no reitera-

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[15] Such hard cases are not altogether new. *Partida* 4, Title xxiii, law 5 recognized: "They ought not to be reckoned among children, who are not born with the human form; as if they have the head or other members of a beast. . . ."

[16] Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard, 1987) shows how compromises are in fact reached where the democratic political process is permitted to work.

tion of its hierarchic legal authority can erase from our hearts the memory that unborn children were long recognized under our own law and that of Continental Europe as human beings. Both our words and those of any District Judge would ring hollow if they tried to teach the people of this State that they were morally wrong on this issue. It is a fact, not a wish, that the Abortion Cases impair the moral and true political authority of this Court needed on other issues to keep the peace.

If this Honorable Court were to reconsider the Abortion Cases, allowing Louisiana once again to recognize the humanity of her unborn children, it would only admit, and re-establish, the Court's own humanity. What the Court did in the Abortion Cases was understandable. The full consequences of a unilateral right to choose were beyond the experience of the Common Law. The Civil Law had seen this issue before in the right of the Roman *paterfamilias*. The Court could well learn from the experience of the past twenty years what it took the Civil Law centuries to realize. We all have our share in both the frequent tragedy and the ultimate triumph of the true dialogue of liberty. We therefore respectfully urge this honorable Court to grant writs of certiorari in these cases.

Respectfully submitted,

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